BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LANCE D. SMITH Claimant	)	
VS.	)	
GREAT AMERICAN HARDWOOD FLOORS, INC. Respondent	)	Docket No. 1,048,316
AND	)	
SENTINEL INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 15, 2011, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on September 21, 2011. The Director appointed Gary Terrill to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. David H. Farris, of Wichita, Kansas, appeared for claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's permanent partial disability was 7.5 percent on a functional basis and an 83.5 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the evidence does not show that claimant is entitled to a work disability. Respondent contends claimant should be limited to his functional disability and asserts that the impairment rating of Dr. David Hufford of 5 percent to the whole body is the most credible. In the alternative, respondent contends the Board should average the

impairment ratings of Dr. Hufford and Dr. Pedro Murati, resulting in an impairment of 7.5 percent to the whole body.

Claimant argues that the evidence shows he is entitled to a work disability and, therefore, the ALJ's Award should be affirmed in its entirety.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent for 2 1/2 years as a sander/installer. The job required him to work bent over and on his hands and knees. It was heavy manual labor that required him to pull up flooring, carry weights up to 80 pounds, and spend 6 to 9 hours a day bent over. Claimant is alleging an injury to his low back that occurred on August 2, 2009. He said he was prepping a gymnasium floor. He had gotten some flooring laid out and felt a strain in his back. He notified his supervisor that he injured his low back, and he continued to work. He testified that as he continued to work, his physical condition gradually worsened.

Claimant was terminated by respondent for reasons not related to his injury. Claimant's last date of employment with respondent was November 6, 2009. After his termination, claimant filed for unemployment and received benefits until October 15, 2010. He said he was willing and able to work to the best of his ability, and he looked for work while he was on unemployment as required. Claimant said he has a GED. He has Attention Deficit Hyperactive Disorder but has no other medical conditions that affect his ability to work apart from his restrictions from this injury.

Claimant first told a medical provider about his back problems on October 22, 2009, when he saw his personal physician, Dr. Diana Ketterman, because he was sick. He mentioned to her that his back was sore, and she told him he probably just had a strain and would be fine. Later, because his back was no better, he tried to see Dr. Ketterman again, but she was out of the office so he saw another doctor in her clinic, Dr. Zafar. Dr. Zafar scheduled him for an MRI and gave him a prescription for Lortab. The MRI showed evidence of mild degenerative disc disease at L5-S1.

Dr. Michael Munhall is board certified in physical medicine rehabilitation and performs independent medical evaluations and electrodiagnostic studies. He examined claimant at the request of claimant's attorney on December 11, 2009. Claimant told Dr. Munhall he worked for respondent since August 2006 and did installation of flooring, carrying boxes up to 75 pounds, using sanders, saws and nailers. Claimant told Dr.

Munhall he injured his back in June 2009[1] and his condition became worse with daily work activities.

Claimant told Dr. Munhall he had constant central low back pain with intermittent sharp muscle spasms. On examination, Dr. Munhall found claimant had palpation tenderness through the distal low back region. A trigger point was identified at the right level sacral gutter. There was loss of active forward flexion and loss of segmental movement through the distal lumbar segment. There was a loss of active right and left side bend and complete loss of standing extension. He diagnosed claimant with lumbar derangement syndrome. He opined that there was patient history and examination evidence consistent with an injury in evolution from approximately June 2, 2009, during claimant's employment. Dr. Munhall recommended claimant have physical therapy, soft tissue trigger point management and temporary modified duty.

After the December 11, 2009, examination, the ALJ ordered that Dr. Munhall be claimant's authorized treating physician. Dr. Munhall next saw claimant on February 18, 2010. In describing his treatment, Dr. Munhall said claimant was put on a spine extension program which included the P90X program, an aggressive workout program. He discussed with claimant that he customize the program and not complete the intensity or lengths of the program. Over time, claimant's range of motion in extension was restored and his pain was centralized. Claimant was compliant with his home program and showed good progress. At his last visit on March 9, 2010, claimant told Dr. Munhall he felt his condition was better. Dr. Munhall found claimant to be at maximum medical improvement, and claimant was released to continue his independent health programs as of March 11, 2010. Dr. Munhall's final diagnoses were lumbar derangement syndrome, subcategory 3, which was nearly resolved, and lumbar spine extension dysfunction syndrome. Although lumbar spine extension dysfunction syndrome was first mentioned in Dr. Munhall's March 9, 2010, notes, he explained that claimant had loss of spine extension all along and he could have included that diagnosis earlier. But at the end of claimant's treatment, claimant had not returned to have full standing or prone extension, so it was included in his final diagnoses.

Dr. Munhall recommended claimant have permanent restrictions of maximum lift, carry of 40 pounds, push and pull 60 pounds; maximum repetitive lift and carry 30 pounds, push and pull 40 pounds; no static or repetitive working, meaning lifting, carrying, pushing or pulling greater than 20 pounds below waist level; occasional repetitive kneeling, squatting, and static sitting below the waist. Dr. Munhall reviewed the task list prepared by Jerry Hardin. Of the total 69 tasks listed, Dr. Munhall said claimant has lost the ability to perform 45, for a 65 percent task loss. There were 52 unduplicated tasks on the list, 35

[1] Claimant testified he was injured August 2, 2009. In his Application for Hearing filed November 12, 2009, claimant alleged a series of accidents from August 2, 2009, through November 3, 2009. At the Regular Hearing, the parties stipulated to an accident date of August 1, 2009. R.H. Trans. at 3. In the Award, the ALJ noted the stipulated date of accident was "on or about August 1, 2009." ALJ Award (June 15, 2011) at 2.

of which, according to Dr. Munhall, claimant is unable to perform for a 67 percent task loss.[2] Dr. Munhall opined that claimant should be able to find work within his restrictions.

Dr. Pedro Murati is board certified in rehabilitation and physical medicine, electrodiagnostic medicine, and is a certified independent medical examiner. At the request of claimant's attorney, he performed an examination of claimant on June 2, 2010. Claimant's chief complaint was back tension. Dr. Murati reviewed claimant's medical records from Drs. Ketterman, Zafar and Mundall. Claimant had no formal physical therapy; he did home exercises. He had no injections and no surgery. Dr. Murati noted an x-ray of claimant's low back showed he had mild degenerative disc disease at L5-S1 but was otherwise unremarkable. Dr. Murati said claimant denied any significant injuries to his back before his work related injury that was sustained on June 2, 2009, through November 3, 2009.

Dr. Murati said MSR's for the bilateral lower extremities revealed a missing right knee reflex. Sensory examination to pinprick was intact. Muscle strength for the bilateral lower extremities was normal. His examination of claimant's back showed the L5 spinous process to be tender to palpation with increased tone noted on the right. Pelvic brim examination showed the right to be rotated forward and the left hiked. Claimant had a negative axial load, axial rotation, distraction and flip examination. He had no atrophy of the calf. Pelvic compression was negative. SLR's were negative. Claimant had a positive right SI joint examination. Dr. Murati diagnosed claimant with low back pain with signs and symptoms or radiculopathy and right SI joint dysfunction. Based on the AMA *Guides*,[3] Dr. Murati placed claimant in Lumbosacral DRE Category III for a 10 percent permanent partial impairment of the whole body.

Claimant asked Dr. Murati not to issue restrictions at the time of the June 2, 2010, examination, and he told claimant to work as tolerated and use common sense. He stated that claimant's current diagnoses were within a reasonable medical probability a direct result of his work-related injury that occurred on June 2, 2009, through November 3, 2009.

At the request of claimant's attorney, on August 18, 2010, Dr. Murati prepared an addendum to his initial report which contained work restrictions for claimant. Dr. Murati indicated the restrictions he issued on August 18 were those he would have placed on claimant had he not asked him to refrain from doing so. The restrictions Dr. Murati placed on claimant were no lifting, carrying, pushing and pulling over 20 pounds, only occasionally

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[2] Dr. Munhall testified only about the number of tasks which claimant is unable to perform on the complete list. However, the Board will count only the number of unduplicated tasks, 52, of which, according to Dr. Munhall, claimant is unable to perform35, for a 67 percent task loss. In the Award, it is noted the ALJ found that both Dr. Munhall and Dr. Murati computed claimant's task loss to be 67 percent.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

up to 20 pounds, and frequently no more than 10 pounds. Claimant was not to crawl. He could rarely bend, crouch or stoop, could occasionally sit, climb stairs, climb ladders, squat or drive, and could frequently stand and walk. He was to alternate sitting, standing and walking. Dr. Murati reviewed the task list prepared by Jerry Hardin. Of the total 69 tasks listed, Dr. Murati said claimant has lost the ability to perform 45, for a 65 percent task loss. There were 52 unduplicated tasks on the list, 35 of which, according to Dr. Murati, claimant is unable to perform, for a 67 percent task loss.[4]

Dr. David Hufford, who is board certified in family practice and sports medicine, examined claimant on October 19, 2010, at the request of respondent. His examination revealed no direct tenderness over the lumbar vertebrae. He found claimant had some tenderness in the paraspinal musculature, but he did not identify any trigger points or guarding. There was no tenderness directly in his sacroiliac joints. Axial loading did not reproduce any low back pain. Muscular strength for all major muscle groups in his legs was symmetric. He had negative straight leg raises. His gait was normal without evidence of limping or pain behaviors. Dr. Hufford diagnosed claimant with a myofascial lumbar strain with residual low back pain. He determined that claimant was at maximum medical improvement on October 19, 2010.

Based on the AMA *Guides*, Dr. Hufford deemed claimant was in Lumbosacral DRE Category II with a 5 percent whole person impairment. This rating was based on claimant's history of mild low back pain. He said claimant had no evidence of any radicular symptomatology. Claimant's primary pain was in the morning and went away almost completely after stretching. Dr. Hufford opined that claimant was not significantly limited in any way and there was no reason for restrictions. Dr. Hufford reviewed Dr. Hardin's task list. As he found claimant was not in need of restrictions, the task list did not come into play.

Jerry Hardin, a human resource consultant, met with claimant on September 14, 2010. Mr. Hardin compiled a list of 69 tasks claimant performed in the 15-year period before his injury[5]. Claimant was unemployed and had a 100 percent wage loss. He did not verify with any employers that claimant held the positions on his task list, and he did not verify the physical demands of any of the jobs.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

[4] See Footnote n.3.

[5] Only 52 of those tasks were unduplicated.

claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,[6] the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.
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> K.S.A. 44–510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 320,

[6] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 3, 214 P.3d 676 (2009).

944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

In *Tyler*,[7] the Kansas Court of Appeals stated: "Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

ANALYSIS

Three physicians testified in this case. Two of the three gave opinions concerning claimant's percentage of permanent impairment under the AMA *Guides*. Both found claimant has a permanent impairment of function to his low back. Dr. Murati rated claimant's impairment as 10 percent, whereas Dr. Hufford opined that claimant's permanent impairment of function is 5 percent. The ALJ found both opinions to be credible and determined claimant had proven a 7.5 percent functional impairment. The Board agrees and affirms this finding.

All three testifying physicians gave opinions concerning claimant's need for permanent restrictions and task loss. Drs. Munhall and Murati recommended similar work restrictions and, utilizing Mr. Hardin's list of 69 job tasks that claimant had performed during the 15-year period before his accident, opined claimant could no longer perform 45 for a 65 percent task loss. However, of the 69 job tasks on Mr. Hardin's list, only 52 were unduplicated and of the 45 claimant could not perform, only 35 were unduplicated for a 67 percent task loss. On the other hand, Dr. Hufford opined that claimant did not need work restrictions and, therefore, he had no task loss. The ALJ was persuaded by the task loss opinions of Drs. Munhall and Murati and found claimant sustained a 67 percent task loss from his work-related back injury. The Board agrees and affirms this finding.

The ALJ found claimant has not worked since November 2009 and, therefore, has a 100 percent wage loss.

The ALJ averaged claimant's 67 percent task loss with his 100 percent wage loss, as required by K.S.A. 44-510e(a) and determined claimant is entitled to an award of permanent partial compensation based upon an 83.5 percent work disability. The Board agrees and affirms this finding.

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[7] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010). See also *Lewis v. Sun Graphics, Inc.*, 2010 WL 3564802, Kansas Court of Appeals unpublished opinion filed September 3, 2010 (No. 103,277).

CONCLUSION

Claimant sustained personal injury to his low back by a series of accidents that arose out of and in the course of his employment with respondent. By stipulation of the parties, the date of accident for that series shall be treated as August 1, 2009. It is not disputed that claimant continued to work and earned at least 90 percent of his pre-injury average weekly wage from August 1, 2009, through November 6, 2009. Therefore, for that period, claimant is entitled to an award of permanent partial disability compensation at the percentage of his functional impairment, 7.5 percent. Thereafter, claimant's permanent partial disability compensation will be based upon his 83.5 percent work disability, the average of his percentage of wage loss and his percentage of task loss.[8]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated June 15, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[8] Although the ALJ's Award calculation utilized only the percentage of work disability, the dollar amount of claimant's weekly permanent partial disability compensation and the total dollar amount of the permanent partial disability award is the same as when the period of functional impairment is included.